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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY,
AND ÆTNA CASUALTY & SURETY COMPANY,
Appellants,

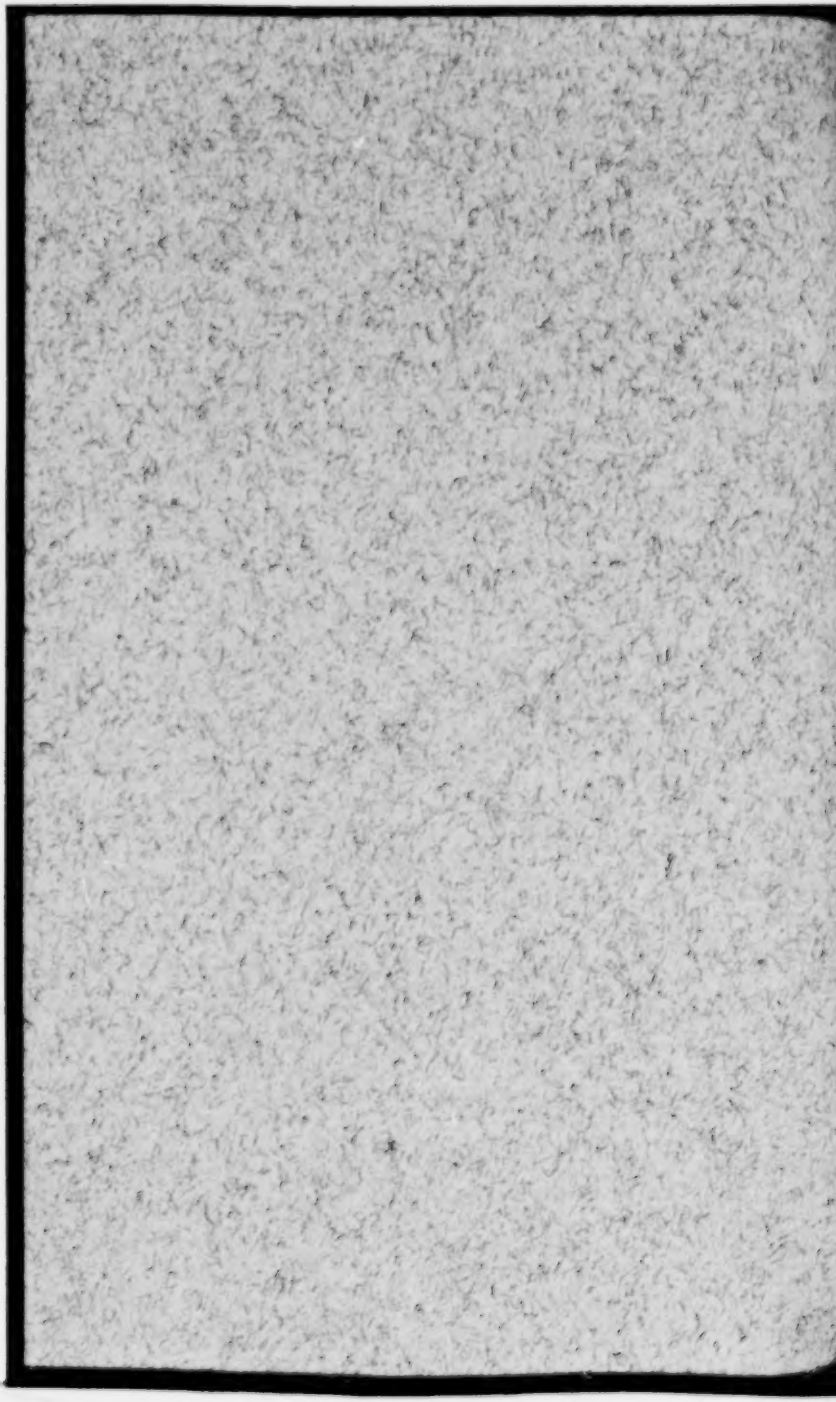
vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

WM. M. HALL,
Counsel for Appellants.



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BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Motion to Dismiss.

Appellee's motion to dismiss was not served upon appellant within fifteen days after appellee was served with a copy of petition for and order allowing appeal, with copy of the assignment of errors and statement of jurisdiction, as required by Rule 12, Paragraph 3, and is not, therefore, to be received in advance of the court's ruling upon the jurisdictional statement. Rule 7, Paragraph 3.

Appellants were served with the motion to dismiss August 9th, 1940 and the appeal was allowed and appellee was served May 22nd, 1940.

Motion to Affirm.

Appellee does not seriously question this Court's jurisdiction of the case upon this second appeal. Its motion is really one to affirm.

Appellee moves to affirm, not upon the ground that the appeal was taken for delay only or that the question upon which the decision of the cause depends are so unsubstantial as not to need further argument, as contemplated by Rule 7, Paragraph 4, but upon the ground that there is "no Federal question herein presented not thoroughly settled", by which it means, judging from the argument advanced in support of the motion, that this Court should not consider that the Mississippi Court did not comply with its opinion and mandate in approving with its judgment affirming the Trial Court's placing upon the contract provision in question, a construction obviously different from that which this Court put upon it, on the ground that the Federal question, upon which it took jurisdiction, did not involve a construction of that provision and this Court went beyond its province in construing it as it did.

Appellee states broadly upon page 20 of its brief, that there was naught to be considered upon that appeal but deprivation without due process.

The question upon which this Court took jurisdiction has but to be stated for appellee's error to be apparent.

The question was whether the principal appellant had a right in that provision, under the laws of Tennessee, which it was deprived of without due process.

Whether appellant had such a right in that provision was manifestly as much a part of that question as was the question whether there was deprivation without due process.

This Court has held many times that where the Federal question is whether the obligation of a contract is impaired or there is deprivation of a right under a contract without

due process, the existence of the contract or the right claimed thereunder is part of the Federal question; and that this Court construes the contract to so determine.

Clark v. *San Francisco*, 124 U. S. 639, 31 L. Ed. 553;
Douglas v. *Kentucky*, 168 U. S. 488, 42 L. Ed. 553;
Citizens Savings Bank v. *Owensboro*, 173 U. S. 636, 43 L. Ed. 840;
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 72 L. Ed. 801;
Georgia Power Co. v. *Decatur*, 281 U. S. 505, 74 L. Ed. 999;
Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95, 82 L. Ed. 685.

To determine in this case whether appellant had the right claimed, this Court necessarily had to construe that provision and determine whether it was a condition precedent to liability under the laws of Tennessee, for if it was not such a condition, appellant had no substantial right to be protected in.

The Mississippi Supreme Court evidently recognized that since it expressly conceded in proceeding to the judgment from which the first appeal was taken, that it was a condition to liability under the Laws of Tennessee.

That this Court construed the provision as a condition precedent to liability under the Tennessee law, is apparent from the plain language of its opinion. Appellee confesses this in its attempt to avoid in the way stated.

Of course, this Court's opinion and mandate did not deprive appellee of the right to traverse the *facts* set up in the plea upon which this Court in part predicated its determination, or of the right to set up by replication to the plea, if the Trial Court gave it leave so do to, *facts* by way of confession and avoidance.

Appellee's contention is that the matters set up in its fourth replication were within that right. It admits, just

as the Mississippi Supreme Court did, that the matters set up in its three other replications were matters which were concluded by this Court's decision.

Appellee's fourth replication was, "plaintiff says that the contract and suretyship herein sued upon did not make it a condition precedent to liability on the part of the defendant and any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after termination of the suretyship for the defaulting employee, and said contract of suretyship did not provide that the same should be forfeited in event said claim should not be made upon the defendant, the surety, within said period of time and therefore plaintiff should not be precluded from having and maintaining said suit herein."

From that it is seen that appellee set up in that replication not facts to avoid, but a construction of the provision in question, different from that put upon it by the Court.

This Court had the contract before it, as appellee had exhibited it with and made it part of its declaration and knew that there were no terms in the contract expressly making that provision a condition precedent to liability and none that noncompliance would forfeit appellee's rights under the contract and the Court, therefore, is presumed to have considered those matters when it determined that the provision was a condition precedent to liability under the laws of Tennessee.

Appellee, in that replication, did what this Court held in *Chaffin* v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727, was not permissible after this Court's decision and remand for further proceedings.

Appellee calls attention to the fact that appellant did not demur to this replication as it did to the other three on the ground that the question therein attempted to be raised had been settled by this Court contrary to the law of the case, but it will be apparent to the Court when it comes to review

the record that appellant, by demurring would simply have wasted time in view of the fate of its demurrers to the other replications in the trial court. Appellant, of course, by taking issue upon this replication did not admit that appellee was right in its legal view of this provision; in other words, did not admit that appellee's legal construction of the provision was correct and this Court's legal construction of the provision was wrong and not the law of the case.

The fact that appellee did not contend under its demurrer to the plea when the case was first before the Mississippi Supreme Court, that the provision in question was not a condition precedent to liability under the laws of Tennessee, could not give appellee, as it seems to suggest, the right to have the Trial Court rehear and overrule the decision of this Court, on the belated argument that the provision was to be construed as not a condition precedent because it was not expressly declared so to be or did not provide that non-compliance would forfeit appellee's rights under the contract. Appellee's not making that contention, but standing solely upon that provision's being governed by Mississippi law, could only constitute a waiver of that contention or a concession that appellant's claim with respect to the character of that provision, as set up in its plea in bar of the action, was correct. It would, therefore, be a reason why the question was closed rather than that it was open to further consideration.

Appellee contends that it put the Tennessee law in issue as a fact when, after the remand, the case appeared in the trial court; and that appellant did not upon the trial prove the Tennessee law.

It is conceded that appellee filed a general traverse of appellant's plea after having filed its fourth replication. This traverse was filed just as the trial was entered upon.

The allegations in the plea with respect to the law of Tennessee, were that there was no statute in Tennessee that

prohibited and rendered invalid the provision in question; and that the Supreme Court of Tennessee had held and announced in certain cases named therein and other cases, as the law in Tennessee, that such condition or limitation in such a contract was valid and binding.

This Court thus had before it certain named Tennessee cases for its consideration in determining the character and validity of the provision in question.

It is the rule that Courts do not take as admitted by demurrers the legal effect ascribed to Court decisions referred to in pleadings, but determine for themselves what that effect is, just as they determine the meaning of contracts when their effect is in controversy. *Finney* v. *Guy*, 189 U. S. 335, 343, 47 L. Ed. 839, 844.

It is presumed, therefore, that this Court determined the validity and character of the provision in question in the absence of a statute in Tennessee upon the subject, in the light of its own interpretation of the named Tennessee cases.

It is conceded that after the traverse of the plea it was perhaps necessary for appellant to show that there was no statute in Tennessee prohibiting and rendering invalid such provisions in such contracts. It is stated in appellant's statement of the case in their statement of Jurisdiction and is not denied by appellee in its brief and it will be seen in the record, that it was stipulated between counsel upon the trial that there was no statute in Tennessee prohibiting and rendering invalid such provisions in such contracts.

The traverse put in issue the existence, but not, of course, the legal effect of the Tennessee cases named in the plea. Actual proof, however, did not have to be made of them because the Mississippi Courts take notice of the laws of other States as they do the laws of Mississippi. *Perkins* v. *Guy*, 55 Miss. 153, 177-178; Miss. Code 1930, Section 1598.

Section 1598 reads as follows:

> "Court to take notice of law of United States, other states and territories—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state."

It is evident from the discussion of the named Tennessee cases and other Tennessee cases in its opinion in this case that the Mississippi Supreme Court took notice of the Tennessee cases under that rule.

In view of the Mississippi law it was possibly not necessary to stipulate with respect to the absence of a statute in Tennessee upon the subject of such provisions, but for fear that it might be considered that the rule did not apply where the allegation was that there was no statute, the stipulation was made to eliminate any question about it.

It is, therefore, respectfully submitted that the Federal question upon which this Court took jurisdiction involved the construction of the provision in question and that the Mississippi Supreme Court disregarded this Court's construction of that provision and appellee's motion to affirm as well as its motion to dismiss should be denied and the case should be heard upon its merits upon the record.

WM. M. HALL,
Counsel for Appellants.